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From Here to There: A Practitioner's Guide to Migrating an Existing Trust to South Dakota

A client's trust was established twenty years ago under New York law with a New York bank as trustee. The bank's trust department has since been acquired twice, the relationship officer is on the third successor, and fees have increased while service quality has declined. Meanwhile, the client has become aware that South Dakota offers a directed trust structure, no state income tax on trust assets, a dynasty trust framework with no rule against perpetuities, and one of the strongest asset protection regimes in the country — none of which the original instrument contemplates.

The question is not whether a migration is worth pursuing. In many cases it clearly is. The question is how to execute it: which mechanism applies, what the trust instrument and governing statute permit, what tax consequences flow from the move, and what steps are necessary to establish — and maintain — South Dakota as the genuine situs of administration.

This article provides a practical framework for answering those questions.

Step One: Diagnose What Is Actually Being Changed

“Moving a trust to South Dakota” is shorthand for a cluster of distinct legal changes that may not all need to happen simultaneously — and that may require different legal mechanisms depending on the trust's terms:

1. **Changing the trustee** from a non-South Dakota trustee to a South Dakota corporate trustee
2. **Changing the governing law** from the original state's law to South Dakota law
3. **Changing the situs of administration** to South Dakota as a factual matter
4. **Amending the trust instrument** to incorporate South Dakota-specific provisions (directed trust structure, trust protector, modified distribution standards, extended perpetuities term)

These four changes are analytically separate. The governing instrument may expressly authorize some and be silent on others. The trustee may have unilateral authority to accomplish certain changes and need beneficiary consent or court approval for others. Clarity at the outset about what specifically needs to change — and why — drives the selection of the right legal mechanism.

Step Two: Identify the Applicable Mechanism

A. Trustee Resignation and Appointment of South Dakota Trustee

The simplest migration begins with the trustee. If the trust instrument contains a trustee succession mechanism or grants the power to appoint a successor trustee, the existing trustee can resign and a South Dakota corporate trustee can be appointed in its place. This is often achievable without court intervention and without beneficiary consent, depending on the instrument's language.

Changing the trustee alone does not change the governing law. A trust that previously designated New York law as governing does not automatically shift to South Dakota law simply because a South Dakota trustee is appointed. An instrument amendment — or a separate mechanism for changing governing law — is required to complete that step. However, appointing a South Dakota trustee is the necessary first step in virtually every migration scenario because it establishes the state nexus for siting purposes.

B. Change of Governing Law: SDCL § 55-3-33

South Dakota codifies broad deference to choice-of-law provisions in trust instruments at SDCL § 55-3-33. A trust instrument may be amended by the trustee — or in some cases by the trust protector acting under an express grant of authority — to redesignate governing law as South Dakota law, provided that South Dakota has a reasonable relationship to the trust. The appointment of a South Dakota trustee who is conducting genuine administration in the state satisfies that relationship requirement.

The change of governing law should be reflected in a formal amendment or restatement of the trust instrument. It should not be accomplished by letter or correspondence. The amendment should include an express choice-of-law clause designating South Dakota law for both construction and administration, and should cross-reference the trustee's South Dakota charter and the situs of administration.

C. Decanting Under SDCL § 55-2-15

Where the governing instrument does not contain workable trustee succession or amendment provisions, or where the client wishes to make more substantial changes to the trust's terms simultaneously with the migration, decanting under South Dakota's statute provides a comprehensive vehicle. A trustee with discretionary distribution authority over principal can distribute assets into a new South Dakota trust with materially different terms.

A decant-and-migrate transaction typically proceeds as follows:

5. Appoint a South Dakota co-trustee or successor trustee with authority to exercise the decanting power
6. Draft the second trust under South Dakota law, incorporating the directed trust structure, updated administrative provisions, trust protector, and any other desired changes
7. Provide required notice to qualified beneficiaries under SDCL § 55-2-15
8. Execute the decanting — assets of the first trust are distributed to the second trust
9. Terminate the first trust in accordance with its terms once assets have been transferred

The second trust is the operative governing instrument going forward, and it is a South Dakota trust from inception.

D. Non-Judicial Settlement Agreement: SDCL § 55-3-24

South Dakota's non-judicial settlement agreement statute permits the trustee and all qualified beneficiaries to resolve any matter involving the trust without court approval, provided the resolution is not contrary to a material purpose of the trust. Where all qualified beneficiaries are ascertained, competent adults, and willing to consent, an NJSA can accomplish a change of governing law, a modification of trust terms, or a trustee substitution in a single document.

The limitation is consent. If qualified beneficiaries include minors, incapacitated persons, or unborn individuals, virtual representation may allow other parties to consent on their behalf under SDCL § 55-3-8 et seq., but the analysis must confirm that no conflict exists between the representative and the represented party.

NJSAs are particularly useful where the desired changes technically exceed what the trustee's unilateral power supports but where all interested parties are aligned on the outcome.

E. Judicial Modification

Judicial modification under the trust's original governing law — or under the UTC as adopted in the trust's domicile state — remains available where other mechanisms are insufficient. A petition for modification based on changed circumstances, unanticipated events, or compliance with the Uniform Trust Code's modification provisions may be necessary if:

- The trust instrument contains no usable amendment or succession mechanism
- Decanting is unavailable because the trustee lacks discretionary principal distribution authority
- The desired changes exceed what NJSAs consent can accomplish
- Beneficiary conflicts prevent consensus

Judicial modification is the highest-friction option and should generally be a last resort. But practitioners should not hesitate to use it when the other mechanisms genuinely do not reach.

Step Three: Establish the South Dakota Nexus as a Factual Matter

Changing the governing law and appointing a South Dakota trustee are necessary but not sufficient to establish South Dakota as the genuine situs of trust administration. State tax authorities in high-tax states scrutinize trust siting claims aggressively. The following elements, taken together, create a well-documented factual record:

Active administration in South Dakota. Trust records, accounting systems, tax return preparation, correspondence files, and trustee decision-making should occur in South Dakota. An out-of-state trustee who nominally accepts a South Dakota co-trustee appointment for siting purposes while continuing to administer the trust from New York will not survive scrutiny.

South Dakota corporate trustee as the administrative engine. A South Dakota chartered non-depository trust company with actual staff, systems, and infrastructure in the state provides the most defensible nexus. Individual trustees nominally residing in South Dakota are more vulnerable to challenge.

Trust situs documentation. Maintain a record establishing when and how the situs changed: the trustee appointment documentation, the governing law amendment or restatement, the date on which South Dakota administration commenced, and the date on which the prior state's administration ceased.

Consistent tax filing position. State fiduciary income tax returns should reflect the South Dakota situs from the date the migration was completed. Filing as a South Dakota trust in year one and claiming prospective

income tax avoidance from that point forward is more defensible than attempting to retroactively claim the benefit.

Step Four: Address the Tax Consequences of the Migration

Income Tax

The migration itself — trustee change, governing law amendment, or decant — generally should not constitute a taxable event for federal income tax purposes. Trust assets are not “sold” or “exchanged”; they change hands within a fiduciary framework. State income tax consequences at the point of migration depend on the original state’s treatment of trust modifications and should be analyzed under that state’s law.

The ongoing income tax benefit begins the day South Dakota administration commences. Income earned before the effective migration date remains subject to the prior siting state’s income tax. This creates an incentive to complete migrations prior to the recognition of significant income events — particularly where the trust holds appreciated assets or pass-through interests likely to generate substantial income.

Gift Tax

A change of trustee, governing law, or situs does not constitute a gift provided no beneficial interests are altered. Where the migration is accomplished through decanting and the distribution standard or beneficiary class is modified, a gift tax analysis is required.

Estate Tax

A trust that was structured to exclude assets from the grantor’s estate should remain outside the estate following migration, provided the new trust instrument does not reintroduce retained powers or interests that would invoke the estate inclusion provisions of IRC §§ 2036–2038. Review the second trust instrument carefully if grantor trust characterization is being modified in connection with the migration.

GST Tax

GST exemption status should carry forward from a prior exempt trust to a successor trust in a migration that does not alter beneficial interests. Where the decanting mechanism creates a “new” trust for purposes of the GST regulations, confirm that the allocation of GST exemption is properly preserved and documented. An affirmative GST election should be evaluated if any uncertainty exists.

Choosing South Dakota: The Jurisdictional Comparison

Attorneys sometimes ask how South Dakota compares to Nevada, Delaware, and Alaska — the other frequently cited trust siting jurisdictions. The comparison turns on several dimensions:

Income tax. South Dakota, Nevada, and Alaska impose no state income tax. Delaware imposes income tax on trust income distributed to Delaware residents.

Rule against perpetuities. South Dakota abolished the RAP in 1983. Nevada, Delaware, and Alaska also allow very long or perpetual trust terms, though the statutory frameworks differ.

Asset protection (DAPT). South Dakota's DAPT lookback period for most creditors is two years from transfer (with limited exceptions). Nevada and Delaware are comparable; Alaska is slightly longer at three years under some creditor categories.

Directed trusts. South Dakota's directed trust statute is among the most developed and most frequently litigated (in the sense of generating interpretive precedent). The statute's clarity on trustee liability limitations under a direction structure is well-established.

Legislative responsiveness. South Dakota's trust law committee meets annually and consistently updates the statutes to address emerging issues. Practitioners working with South Dakota trusts over multi-decade horizons benefit from a legislature that treats trust law as an active policy area rather than a historical artifact.

The practical answer for most attorneys: South Dakota's advantages are most pronounced for trusts requiring a strong directed trust structure, maximum perpetuities flexibility, and a proven legislative track record. It is not the only defensible choice — but it is a very strong one, and for many client situations it is the best.

Conclusion


Migrating an existing trust to South Dakota is not a single transaction with a single form. It is a structured sequence of legal steps — trustee succession, governing law amendment, possible decanting, instrument updates — each of which requires careful analysis of the existing instrument, applicable law, and tax consequences. Done correctly, the result is a trust that brings all the advantages of South Dakota law to bear on an existing trust relationship without disrupting the client's investment advisor, family office, or estate planning team.

For the many clients whose trusts were established before South Dakota's advantages were widely known, a well-executed migration is often one of the highest-value planning steps available to them today.

Sterling Trustees is a South Dakota non-depository trust company and regularly serves as successor or directed trustee in trust migration transactions. We work alongside estate planning counsel at every stage of the migration process — from initial siting analysis through instrument amendment, NJSA coordination, and ongoing administration. Contact [Antony Joffe](#) or schedule a call at calendly.com/sterlingtrustees/30min.

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